No. 80-427

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID J. NEWBURGER
SUSAN SPIEGEL
NEWBURGER & VOSSMEYER
393 N. Euclid, Suite 300
St. Louis, Missouri 63108
314/561-2555
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Whether the District Court erred in dismissing this action on grounds that the Tax Injunction Act, 28 U.S.C. §1341, bars a suit at law for damages under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 arising from Respondents' past discriminatory practices in assessing Petitioners' property and in taxing Petitioners.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray the Supreme Court to grant a writ of certiorari to review the order of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A, *infra*, p. A-1) is reported at 622 F.2d 415. The opinion of the United States District Court for the Eastern District of Missouri is reported at 478 F.Supp. 1231 (App. B, *infra*, pp. A-2 to A-7).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* was entered on June 19, 1980, (App. A, *infra,* p. A-1), affirming the judgment of the United States District Court for the Eastern District of Missouri, entered on November 7, 1979 (App. B, *infra,* p. A-2). The final mandate of the United States Court of Appeals for the Eighth Circuit was entered on July 15, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the proper proceeding for redress.

28 U.S.C. §1341: The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

The questions presented arise out of the District Court's dismissal of an action for actual and punitive damages to

remedy the deprivation of Petitioners' rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. The individual Petitioners, J. David Cassilly and Lynn F. Cassilly, are owners of real property with newly constructed improvements (hereinafter referred to as a "new home") located in St. Louis County, Missouri. Petitioner Fair Assessment In Real Estate, Inc. (hereinafter referred to as "FAIR") is a not-for-profit membership corporation formed by real estate taxpayers in St. Louis County to promote equitable enforcement of real property tax laws in the State of Missouri. Respondents are various past and present officials of St. Louis County and the Missouri State Tax Commission entrusted with responsibility for enforcement of real property tax laws. (Respondent Gene McNary is the County Executive of St. Louis County (formerly "County Supervisor"); Respondents William A. Skaggs and Edmund J. Pung are present and past Directors of Revenue of St. Louis County; Respondents Charles T. Schneider and Frank J. Antonio are present and past Tax Assessors of St. Louis County; Respondents Donald G. Williams, Stephen C. Snyder, and Tom R. Otto are present and past members of the Missouri State Tax Commission.) Petitioners alleged that Respondents have maliciously, willfully, invidiously, systematically, knowingly, and intentionally enforced property tax laws to the damage of Petitioners and other owners of new homes. According to Petitioners' allegations, Respondents have done so by maliciously, willfully, invidiously, systematically, knowingly, and intentionally assessing new homes at a higher rate than old homes and by maliciously, willfully, invidiously, systematically, knowingly, and intentionally singling out such owners who have previously protested such disparity for property tax reassessement.

Petitioners filed this action in the District Court for the Eastern District of Missouri, Eastern Division, on July 2, 1979. On August 13, 1979, Respondents Gene McNary, William A. Skaggs, Edmund J. Pung, Charles T. Schneider and Frank J. Antonio, filed their joint Motion to Dismiss Petitioners' Com-

plaint for failure to state a claim for which relief may be granted and for lack of jurisdiction over the subject matter. On or about August 16, 1979, Respondents Donald G. Williams, Thomas R. Otto, and Stephen C. Snyder, filed an Answer generally denying the allegations in Petitioners' Complaint.

After considering the pleadings, suggestions and memoranda filed by the various parties, and without the introduction of evidence or oral argument, the District Court entered its order on November 7, 1979 dismissing this action in its "entirety," on the basis of the Tax Injunction Act, 28 U.S.C. §1341 (App. B, *infra,* pp. A-2 to A-7). Thereafter, on June 19, 1980, upon consideration of the briefs and oral arguments of the parties, the Eighth Circuit, *en banc,* entered its order affirming the District Court judgment but issued no opinion (App. A, *infra,* p. A-1).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for Writ of Certiorari for two reasons. The case presents an important question of federal law that has not been, but should be, settled by this Court, and a conflict exists in various decisions of the Court of Appeals of several Circuits in respect of the issue presented here.

1. Petitioners' lawsuit was a claim against certain state and local officials as individuals for having maliciously, willfully, invidiously, systematically, knowingly, and intentionally singled out and discriminated against Petitioners by imposing upon them a discriminatory tax. Petitioners were singled out for this discriminatory treatment for two reasons—one, their real property was newer than the countywide average, and two, they had previously appealed their tax assessment.

The District Court dismissed the lawsuit on grounds that the Tax Injunction Act, 28 U.S.C. §1341, barred the federal courts from hearing Petitioners' action at law for damages. The Eighth Circuit, *en banc,* affirmed, upon a four-to-four vote, and issued no opinion.

Petitioners' action is founded upon a claim of discrimination involving property rights. This Court has held that no distinction should be drawn between an invasion of "personal" rights and "property" rights of persons claiming their right to be free from unlawful discrimination. *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 552 (1972).

Therefore, by ruling as they have, the District Court has adopted, and the Eighth Circuit has affirmed, a rule that state and local officials may impose any kind of discriminatory tax—even, for example, a head tax on Blacks, Jews, or Lithuanians —without fear that the federal courts will protect those so discriminated against. The federal courts have not since 1954 been willing to so restrict their power to ensure citizens' civil rights. By their ruling, the courts below have taken that step by

extending the rather clear language of the Tax Injunction Act beyond its limits. The Act refers to equitable sorts of remedies, not to actions for damages in law proceedings.

This Court has recently indicated that it considers the scope of the Tax Injunction Act a matter of significant importance. It has agreed to review *LaSalle National Bank* v. *Rosewell,* 604 F.2d 530 (7th Cir. 1979), *cert. granted,* 100 S. Ct. 1310 (1980), in which the question is when a court should disregard the bar of the Tax Injunction Act on grounds that a state lacks a plain, speedy, and efficient review process in tax matters. The issue presented here is whether the Tax Injunction Act bars actions at law for damages as well as injunctive actions. The importance of the question presented here is equal to that presented in *LaSalle National Bank,* for both address the extent of the limit that the Act imposes upon citizens' efforts to protect their civil rights.

The matter presented here is an important question of federal law that has not been, but should be, settled by this Court.

2. In addition to the foregoing, this Court should grant the petition for Writ of Certiorari because the Circuits are in conflict over whether the Tax Injunction Act bars the federal courts from jurisdiction over actions at law for damages. The Seventh Circuit has clearly decided the question contrary to the Eighth Circuit in *Fulton Market Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979).

The Eighth Circuit is joined in its decision below by a lower court in the Fifth Circuit in a clear holding that the Tax Injunction Act bars such action. *Advertiser Co.* v. *Wallace,* 446 F. Supp. 667 (M.D. Ala. 1978). Moreover, Respondents herein have argued that *Ludwin* v. *City of Cambridge,* 592 F.2d 606 (1st Cir. 1979); *Evangelical Catholic Communion, Inc.* v. *Thomas,* 373 F. Supp. 1342 (D. Vt. 1973), *aff'd,* 493 F.2d 1397 (2d Cir. 1974) (mem.); *Hickmann* v. *Wujick,* 488 F.2d 875 (2d Cir. 1973); *Horn* v. *O'Cheskey,* 387 F. Supp. 1280 (D.N.M.

1974), are to the same effect, although Petitioners dispute that interpretation of those cases.

By implication, a line of cases that have held that the Tax Injunction Act does not bar actions in federal court for tax refunds supports the conclusion in *Fulton Market*. *Bormann* v. *Tomlin*, 461 F. Supp. 193 (S.D. Ill. 1978); *Louisville & Nashville Railroad* v. *Atkins*, 390 F. Supp. 576 (M.D. Tenn.), *aff'd*, 423 U.S. 802 (1975); *Southland Mall, Inc.* v. *Garner*, 293 F. Supp. 1370 (W.D. Tenn. 1968); *Rico Argentine Mining Co.* v. *Board of County Commissioners*, 215 F. Supp. 208, 209 (D. Colo. 1963); *Central Steel Wire Co.* v. *City of Detroit*, 99 F. Supp. 639, 101 F. Supp. 470 (E.D. Mich. 1951), relying upon *Ott* v. *Mississippi Barge Line Co.*, 336 U.S. 169 (1949), as reaching the same result. If those cases are correct, then an action for damages against individual state officers, and not against a public treasury, must not be barred by the Tax Injunction Act.

Other courts among the Circuits, have ruled that the Tax Injunction Act does bar actions for tax refunds. Thus, contrary to the above cited cases stand *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979); *Kelley* v. *Springett*, 527 F.2d 1090 (9th Cir. 1975); *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974); *Evangelical Catholic Communion, Inc.* v. *Thomas, supra; Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972). In addition, Respondents have argued that *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966), and *Natural Gas Pipeline Co. of America* v. *Sergeant*, 337 F. Supp. 88 (D. Kan. 1972), likewise so hold, although Petitioners disagree with that conclusion.

Thus, the Circuits are in conflict over whether a civil rights action at law for damages is barred by the Tax Injunction Act. The decision in *Fulton Market* directly supports the proposition that the Act does not prohibit such an action. The decision below and decisions in at least one other Circuit reach the op-

posite result. Still other decisions among the Circuits support *Fulton Market* indirectly by holding that the Tax Injunction Act is not a bar to actions at law for tax refunds. However, other decisions within the Circuits hold that the Tax Injunction Act bars such tax refund cases. The issue has become embroiled in a series of conflicting and disorganized opinions among the Circuits that require determination by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID J. NEWBURGER
SUSAN SPIEGEL
NEWBURGER & VOSSMEYER
393 N. Euclid, Suite 300
St. Louis, Missouri 63108
314/361-2555
Attorneys for Petitioners

September 17, 1980

APPENDIX

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 79-2031

Fair Assessment in Real Estate Association, Inc.; David J. Cassilly; Lynn F. Cassilly, Appellants, v. Gene McNary; William A. Skaggs; Edmund J. Pung; Charles T. Schneider; Frank J. Antonio; Donald G. Williams; Tom R. Otto; Stephen C. Snyder, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: June 11, 1980

Filed: June 19, 1980

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, McMILLIAN and ARNOLD, Circuit Judges, *En Banc.*

ORDER

The judgment of the district court is affirmed by an equally

divided court en banc. Chief Judge Lay and Judges Ross, McMillian and Arnold would reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEAL, EIGHTH CIRCUIT.

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

Fair Assessment in Real Estate Association, Inc., et al.,
Plaintiffs,
vs.
Gene McNary, et al.,
Defendants.

No. 79-805 C (2)

ORDER

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion to dismiss be and is granted and that this case be and is dismissed in its entirety.

/s/ JOHN F. NANGLE
United States District Judge

Dated: November 7, 1979.

United States District Court
Eastern District of Missouri
Eastern Division

Fair Assessment in Real Estate Association, Inc., et al., Plaintiffs, vs. Gene McNary, et al., Defendants.	No. 79-805 C (2)

MEMORANDUM

(Filed November 7, 1979)

This case is now before the Court on the motion to dismiss of several defendants. Plaintiffs brought this suit pursuant to 42 U.S.C. §1983 alleging that defendants' acts and practices in connection with the taxing of real property in St. Louis County, Missouri have deprived plaintiffs of equal protection and due process of the law. Two specific practices of defendants are alleged to violate these constitutional guarantees: 1) properties with new improvements are assessed at approximately 33-1/3% of their current market value, while properties without recent improvements are assessed at approximately 22% of their current market value, due to the fact that there has not been a general reassessment in the County since 1960; and 2) property owners who successfully appeal their assessment are specifically targeted for reassessment the next year. By these actions, defendants are alleged to have "maliciously, willfully, invidiously, systematically, knowingly, and intentionally" violated plaintiffs' constitutional rights.

Plaintiffs in this suit are Fair Assessment in Real Estate Association, Inc. ("FAIR"), and J. David and Lynn F. Cassilly. Fair is a non-profit corporation whose purpose is to promote and encourage equitable enforcement of the property tax laws

in Missouri. J. David and Lynn F. Cassilly, husband and wife, are owners of real property with recent improvements in St. Louis County. Plaintiffs J. David and Lynn F. Cassilly seek to recover actual damages in the amount of the alleged over-assessments, plus punitive damages. Plaintiff FAIR seeks to recover the monies it has expanded in its attempts to obtain equitable enforcement of the state real property tax law on behalf of its members.

Three groups of defendants are involved. Defendants Charles Schneider and Frank Antonio are the principal defendants. They are the present Tax Assessor in St. Louis County and his predecessor, respectively. It is their allegedly unlawful assessment of real property in St. Louis County which is the gravamen of this complaint.

Defendant Gene McNary is the Supervisor of St. Louis County. Defendants William Skaggs and Edmund Pung are the Director of Revenue of St. Louis County and his predecessor, respectively. These defendants allegedly have supervisory responsibility over the assessor and have acquiesced in the assessor's illegal conduct.

Defendants Donald Williams, Stephen Snyder, and Tom Otto are members of the State Tax Commission. As members of the Commission, these defendants allegedly have supervisory responsibility over the other defendants with respect to the state property tax laws, and have allegedly refused to correct the illegal practices. These three defendants answered the complaint. All the other defendants filed the motion to dismiss now under consideration.

Defendants contend that this suit for damages is barred by the Tax Injunction Act, 28 U.S.C. §1341. That Act provides as follows:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under the state

> law where a plain, speedy and efficient remedy may be had in the courts of such state.

This Act, by its very terms, prohibits this Court from entering an injunction which would enjoin, suspend, or restrain the assessment, levy, or collection of the property tax now in question. *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 551 F.2d 1093 (7th Cir. 1977). It has also been held that this Act prohibits the granting of a declaratory judgment as to the collectability of a state tax. *Illinois Central R. Co.* v. *Howlett,* 525 F.2d 178 (7th Cir. 1975). See, also, *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293 (1943). The issue now presented is whether the Act prohibits a suit for damages in the circumstances presently alleged.

The Seventh Circuit has recently answered this question in the negative. *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978). In that case, plaintiff alleged that defendants had

> systematically, knowingly, intentionally, fraudulently and invidiously assessed its property at levels other than permitted by law and greatly in excess of the levels at which property was generally assessed in Cook County in those years. Id. at 1073.

The court reviewed the cases construing the statute, as well as its legislative history, and determined that permitting an action for damages would not run counter to the underlying policy considerations of the Act.

This Court must disagree with the conclusion reached by the Seventh Circuit, at least to the extent that plaintiffs attempt to apply it in this case. In *Cullerton,* the court summarized the purposes of the Tax Injunction Act as follows:

> The statute, its legislative history and significant cases indicate that the primary evil to be avoided is federal

> equitable relief which would disrupt the state taxing process. A federal court injunction or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federalistic system of government. Id. at 1078.

The court concluded that allowing a damage action under the circumstances alleged would not interfere with those purposes.

In the present case, plaintiffs do not allege that they were discriminated against due to their race, ethnic background or political affiliation. Cf. *Cullerton,* id. at 1079. Rather, they are complaining that the system adopted by defendants results in overassessments of their property. The relief sought comports with these allegations - actual damages to bring their tax payments into line with those of other taxpayers. In effect, the individual plaintiff seek a refund of the alleged overpayments.

It has been held that the Tax Injunction Act bars suits for refunds as well as anticipatory relief. *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975); *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), cert. denied 410 U.S. 966 (1973). Such a result is dictated by the underlying purposes of the Tax Injunction Act. To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications. This Court can not condone such a result.

Property taxation is a subject which is best left to the states to perform in their own ways. The notion of "comity", so strongly reinforced by the Supreme Court in *Younger* v. *Harris,* 401 U.S. 37 (1971), is equally applicable in the present situation

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. Id. at 44.

It can not be disputed that plaintiffs have means to rectify what they consider an unjust situation through the state's own processes. In fact, they have been largely successful in doing just that. Plaintiffs and similarly situated taxpayers have brought numerous suits in state courts challenging the prevailing system of property tax assessment.

In *Breckenridge Hotels Corp.* v. *Leachman,* 571 S.W.2d 251 (Mo.banc. 1978), it was held that the rights of taxpayers such as plaintiffs were violated when their property was assessed at a percentage of current market value much higher than other property in St. Louis County. In *State ex rel Cassilly* v. *Riney,* 576 S.W.2d 325 (Mo.banc. 1979), the Missouri Supreme Court directed the State Tax Commission to ensure that all property was properly reassessed. This direction prompted the passage of legislation to implement a general reassessment in the County. Senate Bill 247, et al. Vernon's Missouri Legislative Service 1979, No. 2, p. 367.

It is clear that plaintiffs' proper course for relief is through the state's channels. This Court should not interfere in the legitimate interests of the state in implementing its own property tax system. Cf. *Younger,* supra. To allow a suit under the present circumstances would be doing just that.

Plaintiff FAIR, as an alleged representative of property taxpayers, is obviously in the same position as the individual plaintiffs. Similarly, the defendants who answered the complaint rather than joining in the motion to dismiss now under con-

sideration are in the same position as the moving defendants. Therefore, this suit will be dismissed in its entirety.

/s/ JOHN F. NANGLE
United States District Judge

Dated: November 7, 1979.